FUNDAMENTAL CHANGES EFFECTED BY THE NEW FEDERAL RULES I

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Judge Davis, and Fellow Members of the Bar: It is indeed very pleasing to see so many of you here and to have such a warm welcome from all of you. I have had the pleasure during the past three months of addressing a great many institutes on the Federal Rules, and it has really been a very stimulating privilege. I think up until last week I had addressed some 5,000 lawyers in different parts of the country, and as you can see, the number is steadily increasing. It has been most worthwhile to come in contact with lawyers all over the country and to see how really anxious they are to learn about the new procedure and how willing they are to reform their former ways of doing things in the Federal Courts.

The subject which is assigned to me is "Fundamental Changes Effected by the New Federal Rules." I can make my speech very short indeed, if necessary, by saying that the only fundamental change effected by the Federal Rules is that there will no longer be any fundamentals in procedure. I think that is a perfectly fair statement of what we have tried to do. The idea here followed is that procedural rules are but means to an end, means to the enforcement of substantive justice, and therefore there should be no finality in procedural rules themselves except as they attain that objective.

As a distinguished English judge put it: in effect, procedure should be the hand-maid and not the mistress of justice.[1] And therefore rules of pleading or practice should at all times be but an aid to an end and not an end in themselves.

I think one result of the rules is that it is very hard to make a mistake which will finally prejudice your rights.

Now, as I want to point out, we have in mind a fairly simple, flexible and easily applied system. Yet I want to say right now that if some of you lawyers desire to be prolix—and sometimes lawyers are, at least so it is said—and if you want to go into considerable detail, while that may not be the best pleading, nevertheless that ought not to prejudice your case finally. As you will see from the rules, there seems little chance of making just a blunder of the kind that will ultimately cost your client his rights. It is provided in one of the most important rules that there shall be no

[1] Compare Collins, M. R., in In re Coles [1907], 1 K. B. 1, 4, and Clark, The Handmaid of Justice, 23 Washington U. L. Q. 297 (1938).

reversal except where there is an error going to the fundamental rights of the parties and where substantive justice requires it.[2]

Now I might just list generally other important things along the same line before I try to talk in some detail about different provisions.

There is first, of course, the union of law and equity, with but one form of action, the so-called united procedure, wherein there are no longer different entrances to the court, or different sides of the court when you get there. There is just one form of proceeding for all civil actions.[3]

There are also the provisions here for joinder of claims and of parties. The general idea is that all the differences between the parties shall be brought out in the open and to the attention of the court for final adjudication at once. Therefore, there is authorization of free joinder of claims of all sort, legal, equitable, in the alternative and so on, and for a very wide joinder of parties with provisions also for extensive filing of counterclaims, likewise legal, equitable or otherwise, and extensive bringing in of third parties not already in the action.[4]

Then there is also contemplated a very simple, concise system of allegation and defense. Some lawyers have been quite a little worried for fear there was not enough required in the way of detailed pleading, but nevertheless this system calls for very brief and direct allegations.[5]

Then there is provision for other extensive rules of deposition, discovery and summary procedure.[6] The general idea in that connection is somewhat unlike the older conceptions, that it is better all around for each side to know the other side's case if it is so desired. Therefore, as you will see, there are provisions permitting one to get quite an extensive examination of the other fellow's witnesses and the other fellow himself before the trial comes on.

Then there are various provisions aiding toward simplicity of the trial itself, including a rule providing rather extensively for the admission of evidence.[7]

There are also provisions for quite a simple form of appeal, for taking the appeal by simply filing a notice of appeal and for making up the record without any formality such as having a bill of exceptions entered and signed by the judge. Really the record is made by the parties and the clerk. As a matter of fact, the judge does not need to take any part unless, or rather, until there is a dispute.[8]

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[2]Rule 61 (Harmless Error), F. R. C. P. See also Rules 1, 8f and 15.
[3]Rule 2 (discussed below).
[4]Rules 13, 14, 18, 20-22 discussed below.
[5]Rules 7-12, 84 and Appendix of Forms, discussed below.
[6]Rules 26-37, 56, discussed below.
[7]Rules 38-53, of Rule 43 (Evidence).
[8]Rules 73-76; discussed below.

Then so far as provisional remedies are concerned, attachment, execution, and so on, the law of the state is followed, since the law of the state necessarily deals with such matters as exemptions.[9] It is natural and proper that that law should apply likewise in the Federal Courts.

Well, I think that I have given you a summary of, not all the important things in the rules, but perhaps some of the most interesting and most important of their highlights.

Now, may I just briefly give you a little of the history, because that is important if we are to know where we now are.[10] I believe it was as early as 1886 that David Dudley Field, the famous New York lawyer, author of the code-pleading reform in this country, first urged the American Bar Association to take action to secure a uniform system of procedure in actions at law. From that time on there was continuous agitation until in 1912 the American Bar Association organized its committee on the subject, the Committee on Uniform Judicial Procedure, under the leadership of Mr. Thomas W. Shelton of Norfolk, Virginia. Then the American Bar Association for some twenty years pressed for adoption of authority in the Supreme Court to make uniform rules of procedure. The bill originally called for authority of the Supreme Court to make rules in actions at law only, since there already existed the power by statute to make rules for actions in equity. In 1922 Chief Justice Taft urged the American Bar Association to secure authorization for the union of law and equity, so at that time there was added to the bill the second section under which the procedure in law and equity might be united. I might say there are unfortunately certain ambiguities in the bill which have arisen because of that history and because of the fact that the provisions were worked out at these different periods. There is a certain amount of conflict between the two sections of the act.[11]

In 1930 Mr. Shelton died and the American Bar Association discharged its committee, three years later, on the theory that nothing could be done to persuade Congress to take the action required. During all these years of its campaign the committee had run up against difficulties in Congress. The chief difficulty was the fact that one of the most vigorous of the Senators, Senator Walsh of Montana, was strongly opposed to this procedure. He argued in effect that this was a program whereby a rather complicated metropolitan practice would be substituted for the

[9]Rules 64, 69.

[10]For more detailed statement of this history, see Clark & Moore, A New Federal Procedure I. The Background, 44 Yale L. J. 387 (1935); Clark, Power of the Supreme Court to make Rules of Appellate Procedure, 49 Harvard L.Rev. 190 (1937); Moore's Federal Practice (1938) Vol. I. §§ 0.02-0.05 and 2.02-2.05.

[11]See pp. 584 and 585. *infra.*

rather simple practice to which lawyers were accustomed. That argument had great persuasive effect.

As a matter of fact, there was so much to be said for the Senator's argument, if one granted the premise he was going upon, to-wit: that this would force federal procedure to adopt some of the worse features of the New York practice, developed in that metropolitan area where they must hurry to get the cases off of the calendar, rather than to spend time for the careful analysis of procedural questions. Of course, you understand I am not talking about the New York Court of Appeals, but about the lower courts of New York, for there is a great deal of very worthwhile reform in procedure in that state and it is especially effective at the present time, due to a most able Judicial Council which is in active operation. But if it were to be the case that the worst features of the New York practice were to be forced on the national courts, then there would have been much to have been said against such a plan. On the other hand, there was an assumption in Senator Walsh's view that the Federal practice had developed quite simple rules. In actual fact that was not the case. I think, too, in the outcome we have been able to demonstrate that the reform did not need to result in a difficult and complicated practice. I wonder perhaps that if he could have seen it he would not have approved of this procedure as we have it as compared to the practice we have just had in the federal courts.

Well, at any rate, there was quite a succession of dramatic events. Senator Walsh was designated as Attorney-General. He died just before taking office and my fellow lawyer from Connecticut, Homer Cummings, took his place. Meanwhile, the American Bar Association had given up the struggle. In 1934 Attorney-General Cummings, addressing the Association of the Bar in State of New York, in outlining certain procedural reforms which he was going to advocate, stated he was going to press for the adoption of the American Bar Association bill for power in the court to make uniform rules of civil procedure. He loves to tell how the then President of the American Bar Association told him he would not get to first base. That was, I think, about March of 1934, and the Act was passed with practically no debate and signed by the President on June 19, 1934. The Attorney-General delights in telling the American Bar Association how they should get bills through Congress. In the main it is that they should not have a bar association committee handling the matter but rather should allow some person with political skill to take charge.[12] I should say that he had a point there. (Laughter.) At any rate

[12]Cummings, Modernizing Federal Procedure, 24 A. B. A. J. 625 (1938). Cf note 10, *supra*.

the bill was passed, the very bill that the American Bar Association had been unsuccessfully advocating for so long a time.

At first there was much sentiment to the effect that the power should be exercised rather slowly, and step by step as it were. Therefore, it was thought that a court should first promulgate rules in actions at law and since it already had uniform rules in actions in equity, last revised in 1912, it could thereafter unite the two in one procedure. Some of you may recall that there was suggested the appointment of district committees to work on that basis during the year 1934-1935.

There were some of us who thought that this was a great mistake, that the idea of trying to achieve reform by piece-meal means that you require of the Bar all the labor of learning a new practice only to find you haven't much when you have finished. If you must necessarily stir things up you might as well wait until you can do a complete job. With my colleague, Professor Moore, I worked out an historical article at that time advocating the further reform and suggesting, what I think is quite important historically, that to have taken that course would have been a retrogression, rather than an advance. That article, if any of you are interested, appears in the Yale Law Journal for the year 1935. Professor Moore has incorporated much of it in his book on Federal Practice, recently published by Matthew Bender & Company.[13]

I might say, as perhaps some of you know, the Supreme Court has suggested that it is undesirable for members of the committee to write books on the subject for the general reason that lawyers might think that what they said was too official. Therefore, what I say to you is entirely unofficial, and cannot be depended on at all. (Laughter.) I believe we can make speeches because everybody knows that what one says in a speech does not count or does not mean anything.

Well, at any rate, I did what I could to stir up some agitation for a more complete reform, and others at the same time did likewise. I happen to know former Attorney-General William D. Mitchell, who later became Chairman of our Advisory Committee, became interested in the matter and wrote a most persuasive, and to my mind compelling, letter to the Chief Justice, giving reasons why, unless the complete reform was to be undertaken, it was better not to start at all.

In the spring of 1935, at the American Law Institute meeting, the Chief Justice announced that the Court would proceed to assume the responsibility given it by the act, would enact a united equity and law pro-

[13]See references in note 10, *supra*. See also Clark, The Challenge of a New Federal Procedure, 20 Cornell L. Q. 443 (1935); Clark, The Challenge for a New Federal Procedure, 19 J. Am. Jud. Soc. 8 (1935).

cedure and would appoint a committee to assist in the work of drafting.[14] The committee was appointed June 3, 1935,[15] and commenced work at once.

We considered our first drafts in the fall of 1935, and from that time met regularly about every two or three months to consider the drafts prepared by myself as the Reporter, and my staff, and with additions made by some of the other members of the committee to whom special tasks were assigned. Thus, Professor Sunderland, of Michigan, a member of the committee, worked from the beginning on the subject of deposition, discovery and summary judgment.

In the spring of 1936 we published, and there was distributed widely to the Bar, the so-called preliminary draft of 1936.[16] Many of you undoubtedly have copies of that draft and will wish to keep them, I should suppose, to note the changes that were made later. That draft contained notes which showed the origin of the rules in the statutes or the equity rules or in some English or American practice.

After that draft was issued district committees in various parts of the country considered the rules at very great length, and I have been amazed, as I think those or most of us who worked on the rules were generally, to see the amount of time, the amount of professional attention which was given by lawyers all over the country to these drafts. There were several committees who sat steadily considering drafts for periods of three and four weeks at a time. The value of those services if it could be computed in money must have run to very high figures indeed.[17]

In 1936 the American Bar Association had a symposium on the subject of the rules at its Boston meeting.[18] At its Kansas City meeting in 1937 there was further consideration of the rules by its Judicial Section.[19]

As a result of these criticisms, all of which were considered, noted and discussed, we worked out two or three intermediate drafts during the year, and by the spring of 1937 had a draft which we felt satisfied us sufficiently to be presented to the Court and to be submitted to the Bar of the country. So there was published what was called our report of 1937.[20] That brought in some more criticisms, not nearly as many, how-

[14]Address May 9, 1935, Proceedings Am. Law Inst., Vol. XII, pp 54-60; 21 A. B. A., J. 340; 55 Sup. Ct. XXXV.

[15]295 U. S. 774, 775 (1935).

[16]Preliminary Draft of Rules of Civil Procedure, etc., May, 1936.

[17]Clark, A Striking Feature of the Proposed New Rules, 22 A. B. A. J. 787 (1936).

[18]22 A. B. A. J. 682 (1936); 61 A. B. A., Rep. 86 (1936).

[19]23 A. B. A. J. 965 (1937).

[20]Report of the Advisory Committee on Rules for Civil Procedure, etc., April, 1937.

ever, for it seemed that we were now well on the way to an acceptable procedure.

In November, 1937, we had a final meeting and made further changes and embodied them in a recommendation to the Court, which was published and is known as the final report.[21] The Court acted on December 20, 1937, in adopting the rules. It made two rather striking changes, the rest being only changes of words or punctuation and the like. In the American Bar Association's publication which is on the table here, you will find in the back of the book a list of the changes as made by the Court, with an indication of those which were suggested by members of the committee to the Court.[22]

Pursuant to the statute, the Court asked the Attorney-General to present the rules to Congress and they were presented at the opening of the session on January 1st, last. According to the statute they had to remain before Congress throughout the regular session and if no action was taken by Congress, they would then go into effect after the close of the session. The rules themselves specified, in Rule 86, that they go into effect three months after the adjournment of Congress. Congress actually adjourned June 16th and therefore the rules became effective on September 16th, last.

There was a certain amount of opposition that developed in Congress. Congressman Ramsey, of West Virginia, introduced a bill that the rules should all be repealed before they had taken effect. There was considerable testimony and discussion before the House Judiciary Committee, a report of which has been printed and is available, if any of you wish to procure it.[23]

The House Judiciary Committee made a report highly favorable to the rules.[24]. Congressman Walter Chandler of Tennessee sat on that committee and was a powerful factor in producing that result. The profession owes him an immense debt of gratitude for his effective activities.

In the Senate there was likewise some opposition, and that came to a head when Senator King's resolution that the taking of effect of the rules be postponed until after the next session of Congress was given a favorable report by the Senate Judiciary Committee.[25] The argument was that the Senate needed more time to study the rules and the extent

[21]Final Report of the Advisory Committee on Rules for Civil Procedure, November, 1937.

[22]Proceedings of the American Bar Ass'n Institute (1938) 429-434.

[23]Rules of Civil Procedure for the District Courts of the United States. Hearings before Com. on the Judiciary, H. of R., 75th Cong., 3rd Ses., Mar .14, 1938, Serial 17.

[24]Report No. 2743, H. of R., 75th Cong., 3rd Session, June 13, 1938.

[25]Senate Report No. 1603, 75th Cong., 3rd Session, April 14, 1938. For Hearings see Hearings on S. J. 281, p. 1, April 18, 1938, p. 2, May 19, 1938.

to which they superseded existing statutes. Senator King tried to get his resolution up for discussion before the Senate,[26] but due to one thing and another, about which I have an idea the Attorney-General would have an interesting story, the matter never came to a vote and the rules went into effect.

That is the general background of the rules. Let me now refer briefly to the matter of the union of law and equity. That, of course, is covered by Rule 2 of the Rules, and other rules depend upon it. Rule 2 provides simply there shall be one form of action, to be known as civil action, and then other rules provide that legal and equitable claims can all be joined as I have previously indicated.

Those of you who are familiar with the history of the Federal system will have in mind that from the beginning the Court exercised rule-making power in the equity cases, whereas in law cases the Court by statute followed the practice in the states where the Federal Court was being held at the time.[27] There was a sound historical reason for this, as of course there is for, or perhaps against, all the things that we went into. At the time of the adoption of the Constitution there was much discussion whether there would be any recognition of equitable rights. Equity was supposed to come from the tyrannical English King. Of course the whole division in the courts of law and equity is explainable only in the light of English history, of the struggle upon the part of the King to ameliorate somewhat the harshness of the legal processes, then the contest for power between the Chancellor and the Lord Chief Justice coming to a head in the historic combat between Coke and Ellesmere, which was only settled when King James I held the power of the Lord Chancellor supreme.[28] Some of the colonies in this country did not recognize equity as a separate system of justice, although the law courts themselves worked out some system which to a certain extent did apply equitable principles without a separate court of equity.[29] At any rate, after some discussion in the federal convention of 1787 it was provided by Article III of the Constitution that the judicial power of the United States should extend to all cases "in Law and Equity" arising under the Constitution, the laws of the United States and treaties.

It was quite natural in order to alleviate opposition to the new Con-

[26]See 83 Cong. Rec. No. 117, p. 11159, June 8, 1938.

[27]For the history of law and equity in the Federal system, see the references in notes 10 and 13, *supra*.

[28]For the royal decree of 1616, see 1 Ch. Appx. 49, 21 Eng. Reprint 588; also Cary 133, 21 Eng. Reprint 65.

[29]Cf. Cowan, Legislative Equity in Pennsylvania, 4 U. of Pittsburgh, L. R. 1 (1937); Von Moschzisker, Equity Jurisdiction in the Federal Courts, 75 U. of Pa. L. Rev. 287 (1927).

stitution that the practice of the local states be followed, and therefore the statesmen of the time provided that the Court should follow that local practice. Since there was no general system of equity there was not the possibility of making that conformity in the equity practice,[30] and, therefore, it was left to the Court itself to work out its procedure. The Courts at first simply passed a simple, general rule that in equity cases they should look to the proceedings of the English Court of Chancery. It was twenty years, I think, something over twenty years, before the Court passed a series of rules in equity other than the simple one I have just indicated. From that beginning, however, on down to the present time the Court has always exercised power to make rules on the equity side and those rules have been uniform for all the Federal Courts throughout the country.

Now, on the law side the system of conformity was originally conformity as of the date of the Judiciary Act, to-wit: 1789. In the case of some of the states newly admitted, statutes were passed making conformity of a later date, the date of their admission, and as to certain details, such as the law of attachments, conformity was had as of the time when the court was sitting. At any rate it was quite a hodgepodge as to the date when conformity should be applied.

After the development of code-pleading, beginning in New York in 1848, the situation was all the more confused. For instance, take the situation in New York in, say, 1860. There the Federal Court would supposedly have to conform to the New York practice of 1789, except in certain regards, such as attachments, executions, et cetera, wherein it would follow the law of 1860. Meanwhile New York had totally reformed its procedure by adopting the Field code in 1848 embodying the united law and equity practice. The confusion was intolerable. Consequently in 1872 Congress adopted the famous Conformity Act providing for conformity to state practice as of the date of the action.

Now, conformity always was a limited concept because of the restricted application of the conformity principle. As we have just seen, conformity could apply only to a case at law. It could not apply to matters affecting the Federal Constitution, which meant that matters of Constitutional rights and matters of the jurisdiction of the Federal Courts were not affected. That took out all the matters concerning the beginning of suit. Conformity did not apply to matters of trial, including submission of evidence, ruling at trial, and so on, nor to matters on appeal. It only applied therefore to the subject of pleading. Then whenever Congress passed an act affecting pleading, it would to that extent cut

[30]Hamilton, The Federalist, No. 83; cf. Clark & Moore, *op cit.* note 10, *supra*, at pp. 397, 398 of 44 Yale L. J. See the latter article for the history set forth in succeeding paragraphs of the text.

down conformity. Congress was more and more called upon to pass reform measures affecting a variety of desirable things, such as statutes providing for freedom of amendment. Whenever Congress passed such an act, then conformity was repealed in the area where the act applied. Hence the area wherein it applied was constantly being narrowed. Moreover the exact extent of the area was continuously in doubt, for it was very hard to ascertain its limits.

The final development began in 1912 and was one where conformity was steadily giving way to a substantial union of law and equity in the Federal Courts. The Equity Rules of 1912 provided in effect that where the case started as an equity case and developed legal features, it should not be dismissed, but should be continued as an equity suit. The Law and Equity Act of 1915 took care of the converse situation. When a case was started at law it was provided that equitable matters could be brought into it and therefore equitable defenses could be filed in it. After 1915 if there had ever been any substantial value to the division between law and equity in the case of the Federal Courts, it was entirely gone.

I may be treading on dangerous ground here in Tennessee, but I want to say that as soon as you get away from the history of the struggle between the Chancellor and the Lord Chief Justice in England, I see no possible justification for a division between law and equity. The great objection to it is the chance of defeating litigants on the ground that they have made unfortunate mistakes in their choice of forum. Those mistakes are naturally those of counsel and they are not mistakes even in the sense of bad errors, or bad judgment, because so many of them concern matters which are uncertain until the Court has spoken. In fact, most lawyers' mistakes are simply bad guesses as to the way the judge is going eventually to rule. Judges are not always dependable, and you cannot be sure how they are going to decide issues.

I notice in New Jersey they say their divided procedure makes for better lawyers. Yet I noticed a case recently where the question for consideration was whether an assignee of a contract claim was in the right court. The Court said that if there was a total assignment the action would be at law, but since it turned out that the assignor had still some claim, some partial claim in the matter he had assigned, it was a partial assignment, and it should have been brought in equity. So out the door went the case with only the consolation that it could be started over again somewhere else.[31] If that makes for better lawyers, I am afraid it is too high a price to pay.

[31]Glaser v. Columbia Laboratories, 11 N. J. Misc. 707, 167 Atl. 201 (1933); see also Young v. Weber, 117 N. J. Eq. 242, 175 Atl. 273 (1934); Jiacorno v. Oration Inv. Co., 103 N. J. Eq. 273, 143 Atl. 329 (1928).

Well, at any rate, in the Federal system, beginning in 1915 if you operated the machinery correctly you could shift back and forth between law and equity. The general idea was that your case was not to be lost but was to be proceeded with on the proper side of the court. From that time on the Supreme Court has been steadily trying to wipe out the vestiges of the old system. I think if the Court, whose views on this point have been pretty practical, had been given another fifty or one hundred years it would have succeeded in getting rid of all the system.

Meanwhile, of course, this would have been costly to the litigants, because all sorts of small problems arose, problems that so far as I could see amounted to nothing except as it benefitted the lawyers who could keep their cases going on technicalities. Questions such as this arose: Could you join legal and equitable claims in a single suit? One would think such a question would have been settled, but it was not. Could you join equitable defenses in a reply? The statute of 1915 said you could have such joinder in an answer. Did that include a reply? The Circuit Court of Appeals of the Second Circuit, sitting in New York, said no.[32] There was a dissenting opinion by Judge Learned Hand, however, which was adopted as the prevailing rule in the First Circuit.[33]

Then there were further questions as to what happened if on appeal the Appellate Court decided that the trial court should have put the case on the other side of the court from where it was, that the trial court, for example, should have taken the case from the equity side and put it on the law side, but had not done so. The upper Court then must decide whether it was to reverse and say to start over, or to reverse with directions of some kind or another, or to say it was harmless error and not pay any attention to it. Well, the various courts were struggling with matters of that kind. Many of us felt it would be a mistake to try to separate the two procedures and draw different rules for them. Of course, the Court ruled, as I have stated, that there should be the one procedure.

Now, just one other point on the union of law and equity. The two questions usually brought up as causing difficulty in a united procedure are the question of appeal and the question of trial by jury. On the matter of appeal, historically, there has been a different method in the two systems. The idea in the equity case has been that of rehearing. The idea in the law case has been that of a writ of error, or search for errors in the actions of the trial judge. There is nothing fundamental in that. The proper solution is to make a short form of appeal, without the opportunity for controversy as to the form to be followed. This is

[32]Keathley v. U. S. Trust Co., 249 Fed. 296 (1918).
[33]Plews v. Burrage, 274 Fed. 881 (1921). See pp. 424, 425 of 44 Yale L. J.

the system provided in the new Federal rules. I expect Professor Wicker may want to refer to it, and I am not going into it now, except I say that we provided in the rule on findings in effect for the equity rule of review, but the equity rule limited as it is in modern law, to the effect that the findings of the trial judge shall stand unless clearly erroneous.[34]

Now, the other matter is that of trial by jury. Judges have made more rulings in fear that they might deny a litigant that Constitutional right, because of the union of law and equity, than as to any other one essential point. This has been unfortunate. I think none of us would wish to deny this Constitutional right—that ought to be applied thoroughly and honestly—but we ought not to work it out in such a way that it is a trap for the successful litigant and an opportunity for the unsuccessful one to gamble on upsetting the judgment against him. In practice, when the litigants realized how sensitive the judges were on this point, they would gamble on the trial, and after they had lost, would then claim on appeal that they had been denied their Constitutional rights. Many of the decisions under early code practice seemed to put a premium on such a course of action. True, it is not necessary at the beginning to decide whether a matter at issue is equity or law, and the act says it does not make any difference. But the judge reasons that if and when this case goes to trial he may not know some details, and if he doesn't, he may make a mistake and not protect the constitutional rights of the parties. It is as if I started worrying now whether my train will take the proper switch at Washington, D. C., so that when I leave here I shall get back to New Haven properly.

As a matter of fact, very few cases are tried anyhow, as you probably all know. Statistics of civil business of the courts indicate that much less than half of the cases go to judgment of any kind, and the number of contested cases is very small indeed.[35] The number of jury cases actually tried in an ordinary jurisdiction is very limited. In one jurisdiction I studied it was less than four per cent of the cases brought wherein such trial might have been claimed.[36] Now to require that every case should be made complicated and technical for fear that in a very limited number of cases you may make a mistake and deny jury trial when there is no reason to expect such a mistake is unfortunate.

It has been discovered in code pleading and code procedure generally, that this right can be protected quite simply without allowing it to be used

[34]Rule 52, F. R. C. P. Cf. Clark & Stone, Review of Findings of Fact; 4 U. of Chi. L. Rev. 190 (1937).

[35]Clark & Shulman, A Study of Law Administration in Connecticut (1937), 23-26.

[36]*Ibid.* 28.

to upset just results. It should be taken care of in a fair way by requiring the claim of jury trial within a proper period of time, subject to the condition that a jury is waived if it is not affirmatively claimed within the stated time.

It is unfortunate that David Dudley Field, in the original New York code, did not work it out in this fashion. Actually he provided in effect that the jury trial was not waived unless a party did something affirmatively to waive it, such as filing a formal waiver in writing. That gave litigants the opportunity to sit back and await developments. Recently this was changed in New York County (i. e. Manhattan) and now I think the rule has been extended to all the counties of metropolitan New York, the rule in effect being that a party now must make a written demand for a jury trial within a certain time, or else he will be held to have waived it. New York has upheld such a requirement under its constitution, and the Connecticut Court has ruled the same way.[37] So far as I know that has been the decision wherever the question has arisen.

Now, that is the provision in these Rules on the section on Jury Trial, Rules 38 and 39. Either side may make a demand in writing, or in a pleading, if denied, for a jury at any time up to ten days after the last pleading. If it is not made by that time, the right is waived. The last pleading in a good share of the cases will be the answer, for in only two cases can there be a reply, and there are no pleadings contemplated after the reply in any event. The two cases where there can be a reply are, first, where there is a counter-claim in an answer; and, second, where there being new matter in the answer, the Court, on motion, orders a reply.[38] In these two cases you may claim your jury up to ten days after the reply. In the other cases it will be ten days after the answer.

This, I think, gives a workable procedure, judging from the experience of the states.[39] You have all the opportunity any one really ought to need to make your jury claim, but if you have not made it well in advance of trial, then you cannot sit back and wait until the trial is over, and when you have lost, make the claim that your constitutional rights have been taken away.

Now, I want to run over a few of the more striking things in the early part of the Rules, and, of course, there is not time to go into great detail. The first general matter is the way suit is commenced. We had

[37]McKay v. Fair Haven & W. R. Co. 75 Conn. 608, 54 Atl. 923 (1903); Craig v. City of New York, 228, App. Div. 275, 239 N. Y. L. 228 (1930), upholding N. Y. C. P. A. § 426 as amended.

[38]Rule 7 (a) F. R. C. P.

[39]See Advisory Committee's Notes to Rule 38; James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L. J. 1022 (1936).

much discussion about this matter. The New Yorkers wanted their system, which is simple service of summons on the opposing side, with an exchange of pleadings between the parties, and with the Court not in the case at all, until some action is asked of it. Under the New York system, therefore, a case can go forward very far before the Court or any of its officers, even the clerk, may know it exists. It is a very simple system, and I think it works quite satisfactorily.

To many lawyers this system seemed undignified and over-simple. It came to be dubbed the "hip-pocket rule," because one lawyer said, "Why, that is just a case where the lawyer carries around the case in his hip-pocket," since the lawyer would have the pleadings and they would not be filed in the Court until some action was requested of the Court. That was one of the alternative plans we suggested in the preliminary draft.[40] Due to the objections of lawyers, who were long on dignity, however, we adopted the original procedure in the Federal Courts, to-wit: that an action is started by filing the complaint with the clerk, and the court's process is issued by the clerk and served by a marshal. That is provided here at the beginning, Rule 3 and Rule 4. You start a suit by taking your complaint to the clerk, and the clerk issues the summons and the summons and complaint are served by a marshal. There is a provision in Rule 4(c) that special appointments in place of the marshal shall be made freely when substantial savings in trial fees will result, but the procedure indicated is the one that was the more familiar system throughout the country.

There is also the further provision that pleadings are served by the lawyers on each other, substantially as is done in a majority of the states. In some states there is such service and in other states the clerk delivers the pleadings to opposing counsel. But here, in Rule 5, when you come to file your answer you are supposed to do it by serving it on the other side and by filing it in the court. Provision is made in Rule 5(b) for service by mail. Whenever there is service by mail, three days extra are allowed for the next step by the other side in response.

Now, beginning at Rule 7 there are outlined the general rules of pleading, and you will see in Rule 7 the limitation on the pleadings I have just stated. The reply is the last pleading permitted, and reply can be had in only the two cases indicated.

Provision as to stating your claim appears in Rule 8(a) and is given in a very general form. The first is the statement of jurisdiction. Second is a short and plain statement of the claim, showing that the pleader is entitled to relief. That is the general provision as to pleading. There

[40]Preliminary Draft May, 1936, Rule 3.

are other provisions applying to special cases, but that is the general rule. Finally in the complaint comes the demand for relief to which he is entitled.

Now, the nature of the pleading here contemplated will appear from the forms which are given in the appendix. These forms are few in number, and are not intended to be a desk manual of forms for the lawyers. They are, as stated in the governing rule, Rule 84, illustrations of the simplicity and brevity contemplated by the pleadings. If you will look at them you will find they are very simple. I know that in the minds of some lawyers they seem over-brief. Beginning, for example, with Form 3 in the appendix through to Form 8, they are really common law forms from the old action of assumpsit, including the common counts in assumpsit. Form 8 is a complaint for money had and received.

Form 9 is one I like to speak about because I think that shows the brevity of the pleadings here contemplated. That is a complaint for negligence, and it contains the usual allegations of jurisdiction and the pleading of the personal injuries, the claim for damages, and so on, but this is the sole allegation as to the happening of the accident:

> "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

Now, Senator King produced a memorandum on the floor of the Senate that a very distinguished lawyer from the District of Columbia said this form would not be good in any State of the Union at the present time.[41] The form actually was taken from the Massachusetts statute.[42] It is the official form suggested for that procedure which has been good and very successful.

From my own study I would say that is a statement of a cause of action I think would be good in at least most of the jurisdictions of the United States at the present time. The only possible question would be whether it is amplified enough, that is, whether a motion for a more definite statement would lie.[43]

Rule 12 provides that you may ask for a more definite statement, but it tries to limit it to cases where some good will be occasioned by granting such a motion. By Rule 12(e) a party may move for more definite statement or a bill of particulars as there stated:

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[41] 83 Con. Rec. 11166, June 8, 1938. Hearing cited note 25 *supra* at p 49.

[42] 2 Mass. Gen. Laws (1932), ch. 231 § 147, form 13, cf. 2 Chitty, Pleadings. (7th Ed., 1844), 529; Williams v. Howland, 10 Bing. 112, 131 Eng. Refr. 848 (1833).

[43] I have discussed this matter more at length in the proceedings before the New York Institute, Oct. 16, 1938, to be published by the American Bar Association. See also Clark, Code Pleading (1938) 206-208; 32 Yale L. J. 483; 9 Conn. Bar J. 282 *et seq.*

> "Before responding to a pleading or, if no responsive pleading is permitted by these rules, within twenty days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial."

It is my own judgment that while the judges, of course, should have a great deal of discretion as to the granting of orders for more particular statements, they are usually a great waste and all you get out of them is time and delay. Ordinarily such a motion should not be granted.

I have a particular bone I want to pick with the New York Judicial Council when I get a chance, but there is not time here, I think. The New York Judicial Council discovered that the filing of motions for bills of particulars was a cause of great delay and so they planned to correct the situation by providing the motions should be automatically granted by the court.[44] This, it seems to me, is just the wrong way to get at the evil. The whole idea in back of this is that it is not worth-while to spend time polishing up these paper pleadings in advance of trial.

You are never going to get anywhere finally unless you are going to say that the ultimate penalty, to-wit: loss of the case, must follow a mistake in pleading. Yet if our judges were to say that, they would find they were criticized at once for technicalities, and the legislature would step in to correct the situation, as it has done continuously in the past. That is not the place where you are going to get evidence for your trial. I think the great mistake has been made in the past in even thinking that pleadings can take the place of evidence, which really means that you are hoping the other fellow will make a slip and say something he does not intend. The trouble with that is, if he is any good he will not do it, and if he is not the judge has got to protect his client from his own actions. (Laughter.)

So that does not work. What you want in pleadings are general statements and that will provide the basis for all your ordinary actions, what I like to call the routing of the case through the court, where it goes for formal trial and so on, and ultimately it provides the basis for

[44]Report of N. Y. Judicial Council (1936), No. 48 G. The New York practice of freely granting motions for bills of particulars may have unfortunate repercussions on federal procedure, for it seems that the federal judges sitting in New York are following the state ideas in allowing such motions contrary to the intent of the federal rules. In Graham v. N. Y. & Cuba Mail Steamship Co., E. D. N. Y. Oct. 28, 1938, such a motion was granted against the plaintiff's lack of knowledge with the suggestion that the defendant's deposition might be taken to secure the information to give back to it! For a decision more in keeping with the intent of the rules, it would seem, see American LaFrance-Foamite Corp. v. Am. Oil Co., Dict. of Mass., Oct. 27, 1938, referring the defendants to its remedy by interrogatories.

that most important thing, namely, res adjudicata. It does not and cannot, however, take the place of trial.

If you need other evidence or information to prepare your case, you want to get it not from these more or less formalized allegations which can be easily changed, which can be amended even at the trial as the rules here provide, but what you require are really provisions for depositions and discovery, for these are the devices whereby you get material of this sort. These devices are covered quite extensively by the rules from Rule 26 to Rule 37. Those rules provide that you may take the deposition of any witness, including a party, for any matter relevant in the case. That includes examining the witness as to such things as the names of other witnesses or loss of documents or exhibits, and so on. Now you can not always use that in evidence. Of course, having taken the deposition you will have the material there if you need it for the preparation of your case.

Rule 26 provides the circumstances under which you may use the deposition in evidence. Those are roughly cases such as this, I will not try to list them all, as they are listed in Rule 26, but you can always use the deposition for cross-examination or impeachment of a witness. When it is the deposition of an adverse party, or the manager or agent of an adverse party, you can use it in evidence. In other cases you can only use it in evidence when the witness is not available, being a hundred miles away, or ill and so on, but that is the general idea—free taking of depositions and the using of them to a certain extent, and quite freely when the witness himself is not available.

Now, it is usually said about those rules that they go too far, that they permit of fishing expeditions and so on. It would seem obvious to me, however, from what I am told is actually the case in the states where a system similar to this is followed, that they prevent fraud, because you immediately get the full story from the parties and you know what you have to cope with. Further, if they change their stories later on at the trial, they are, of course, "sunk."

I have heard it said that such broad deposition provisions work in favor of plaintiffs because plaintiffs could bring personal injury claims and then build up the evidence in this way. Again I am told what I think ought to be the natural conclusion anyhow, that it is most helpful to defendants, or, if that is not a fair statement, it is helpful to those who want to rely on truthful claims. In this kind of case if the defendants immediately ask for depositions from the plaintiffs, they then and there have the story in such a way as it cannot be changed.

Now there are provisions which are quite simple. Rule 33 is an

example of what I have in mind. Rule 33 provides that you may submit a series of questions to the opposing side without even taking a formal deposition.[45] That is a system like the old section on discovery attached to your bill in equity. I want to suggest to you if any of you under these new rules receive complaints that you think are too general and you have an idea of moving for a more definite statement and getting the pleadings polished up and so on, that you ask yourselves whether that is really worthwhile and if that is what you really want. For, after all, what you want is getting something in the line of evidence, and you are not going to get it by your motion for a more definite statement. If I am right this far, you might give up your idea of moving, under Rule 12, for a more definite statement, and proceeding under Rule 33, asking a simple series of questions of the opposing side.

Now, I must hurry on my first appearance, so to speak. There are only two or three more things I want to say. I have not had time to go very much into the method of filing defenses that are set forth in Rule 12.[46] Let me say generally that the system here adopted is an approach to the English rule, but is not a full acceptance of the English rule.

The old common law allowed you to bring up objections *seriatim*. First you have your plea in abatement, then some sort of motion, then some other motion, then a demurrer, and after you had finished with the demurrer, then and only then would you begin really to get down to the essence of the trial. You might have a series of cases that turned out to be sham battles, that got you nowhere. The English system requires you to file all these objections in your answer. You may call any one of them up for preliminary hearing, but the judge will grant the preliminary hearing only if he thinks that to do so will terminate the entire case or one substantial part of the case. I am frank to say that I hoped that was the system we would adopt, because I think there is a great waste in all this preliminary skirmishing. Rule 12 provides for doing it both ways really. Rule 12 provides that all these objections can be made in the answer, and under 12(d), while you may get a preliminary hearing generally, the judge may nevertheless postpone all the matters till the trial. In other words, you may have exactly the English system if the judge is

[45]Professor Moore argues that the restrictions of Rule 26 (a) carry over and apply to the interrogatories under Rule 33, and hence the parties under the latter, as well as the former, rule cannot proceed before answer is filed, except on order of the court. 2 Moore's Federal Practice, § 33.03. I would disagree. No such restriction is stated in Rule 33, which, like Rules 34 to 36, deals with an entirely new subject than that covered in Rules 26 to 32. It takes the place of the bill of discovery, which was a part of the old equity pleadings. And it seems designed, among other things, as a simple and direct way by which the defendant can procure information to prepare his answer.

[46]Pike, Objections to Pleadings under the new Federal Rules of Civil Procedure, 47 Yale L. J. 50 (1937)

strong-minded about it, although I regret to say the general indication is that the normal practice is going to be the other way around, namely, that you have these matters disposed of on preliminary hearing.

Rule 12(b), in providing that all these matters may be covered in the answer, also provides the alternative course of bringing them up by motion and, as I have indicated, that is a half-way position between the old view and the English practice.

Now, just one more general thing, and I will stop, although I trust that you have in mind that in this historical summary I cannot do justice to the details. That general thing is the wide range of joinder that is permitted. I will just refer you to that. I have already spoken of it simply. Rule 18 provides "the plaintiff may join any sort of claim, the plaintiff in his complaint or in his reply setting forth a counter-claim and the defendant in an answer setting forth a counter-claim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party."

Rule 13 provides for just as wide joinder to counter-claims.

Rule 14 provides for bringing in third parties not already a party.

Rule 20 provides for joinder of parties, and that is the only one of this series that states any restriction at all, but that alternative is modeled upon the one which has developed in English procedure and used in New York, Illinois, California, and elsewhere. It is so broad that it is not so very much of an alternative. It is a requirement that will be fulfilled in any case where anybody would ever think of joinder. You may join parties as plaintiff where there is a common question of law or fact affecting all of them, or you may join parties defendant on the same basis.

Now, you have been very good to listen to me so quietly, and I think it is time I stop now. (Applause.)

JUDGE R. A. DAVIS, Chairman:

You have observed that Dean Clark has not touched upon two very important questions covered by the new rules, that of trials and new trials.

Professor William H. Wicker, of the University of Tennessee College of Law Faculty, has made a special study of these subjects, and is recognized as an authority upon them. I take pleasure in presenting him to you, and you may ask him questions, if you wish to do so. Mr. Wicker. (Applause.)